86-1043

CASE NO.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JULIO T. GONZALEZ,

PETITIONER,

-vs-

SHELL OIL COMPANY,

RESPONDENT.

_____/

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISMISSAL OF THE ACTION BY THE DISTRICT COURT SUA SPONTE FOR REASONS RAISED IN AN AFFIRMATIVE DEFENSE WAS APPROPRIATE WHERE PURSUANT TO THE SHELL STANDARD DEALER AGREEMENT SHELL OIL COMPANY DELIVERS TO ITS DEALERS A SMALLER VOLUME OF PETROLEUM FUEL THAN WHICH ITS DEALERS PAID FOR.

II. WHERE THE STANDARD DEALER AGREEMENT DOES NOT DEFINE THE WORD "GALLON" SHOULD THE DISTRICT COURT HAVE ALLOWED A JURY TO DETERMINE WHETHER THE WORD "GALLON" SHOULD HAVE A STANDARD DEFINITION OR EQUITABLE MEANING AS UTILIZED IN THE INDUSTRY.

PARTIES TO THE PROCEEDINGS

The Petitioner, Julio T. Gonzalez, is suing on behalf of himself and Shell Oil Dealers in the States of Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, Tennessee, Texas and Virginia, i.e., all Shell Dealers in states whose average annual ambient temperature exceeds 60 degrees Fahrenheit.

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REFERENCE TO OPINIONS OF LOWER COURTS

The unpublished opinion of the Eleventh Circuit Court of Appeals, the order denying plaintiff's petition for rehearing, also in the appellate court, and the district court's order dismissing the action are reproduced in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on July 31, 1986, affirming the November 29, 1985, dismissal of the Petitioner's complaint. The Court of Appeals denied the timely petition for rehearing on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Florida and the defendant being a Delaware corporation with its principal place of business in Texas.

References herein shall be made to the Docket Number of the pleadings and to the page number of the Record Excerpts designated "RE" as the Record stood in the district court.

The petitioner filed the complaint for damages in the District Court for the Southern District of Florida on behalf of himself and all other dealers similarly situated against Shell Oil Company for losses in deliveries of petroleum products from Shell Oil to petitioner.

The plaintiff and defendant operate under a Standard Dealer Agreement, attached to the complaint as Exhibit "A." RE 4-46. The

Dealer Agreement does not require that Shell Oil sell temperature compensated gasoline gallons to its dealers, but neither does the Agreement require that Shell sell the petroleum to its dealers at an ambient or higher temperature (in the southern climate) so that when delivered to the dealers' underground tanks it cools and shrinks.

The defendant, Shell Oil Company's answer to the complaint contained in its first affirmative defense, the following statement:

> "The Complaint, and each and every count thereof, fails to state a claim against Defendant Shell upon which relief can be granted." RE 47-57.

After the parties were directed to brief the issue of class certification plaintiff was denied discovery by interrogatories pending explicit ruling on the class certification issue. Docket Nos. 11 and 21. On November 27, 1985, plaintiff filed a Motion for Leave to File an Amended Complaint Incorporating a Memorandum of Law with exhibits thereto, which

exhibits included an Amended Complaint. RE 60-150. On November 27, 1985, the court entered an "Order Granting Defendant's Motion to Dismiss for Failure to State a Cause of Action." This sua sponte order, which was the subject of the appeal to the Eleventh Circuit was entered without any motion being filed by either party and was based on the first affirmative defense contained in the answer of Shell Oil Company. RE 151-152. On December 9, 1985, plaintiff filed a Motion to Vacate the Order, Docket No. 25, and Memorandum in Support of Motion to Vacate the Order, Docket No. 26, and a Motion of December 10, 1985, for a hearing on Plaintiff's Motion to Vacate the Order, Docket No. 27.

Prior to any response by the defendant, Shell, the district court entered an order filed December 17, 1985, and dated December 16, 1985, denying Plaintiff's Motion for Reconsideration. RE 153. The order recites

that the "Plaintiff's Motion for Leave to File an Amended Complaint is mooted by this order."

The concept of temperature compensation is relatively simple. The volume of petroleum expands and contracts with changes in its temperature on a relatively substantial basis. Since gasoline expands in warm weather, a gallon delivered in a place where the average air temperature is above 60 degrees Fahrenheit has less fuel capacity than when delivered in colder weather at which time the gasoline contracts in volume. Since changes in temperature of the petroleum change its potential value inequities in sales and purchases of petroleum exist unless gasoline is bought and sold at an adjusted constant standard temperature. As it is impossible to keep petroleum at a constant temperature, the petroleum industry commonly sets a standard temperature at which virtually all oil volumes can be adjusted for accounting purposes in a sale or other transaction.

The petroleum industry generally adjusts this inequity by defining a gallon as it relates to petroleum and petroleum products as 230 cubic inches at 60 degrees Fahrenheit. This is evident throughout the American Petroleum Industry Manual of Petroleum Measurement Standards, Volumes 1 and 2, and the United States National Bureau of Standards, copies of which were attached to plaintiff's complaint.

Defendant, Shell Oil Company, purchases its product on a temperature compensated basis, a fact admitted in its answer in this case. Nonetheless, Shell refuses to temperature compensate on its sales to dealers. Plaintiff's attempt to amend the complaint, which attempt was mooted by the district court's order filed December 17, 1985, denying Plaintiff's Motion for Reconsideration, sought compensation from Shell for an overbilling for prepayment by the dealer of state and federal taxes. Shell Oil

collects from its dealers state and federal taxes on a pre-paid "temperature-uncompensated" basis. However, the dealer is able to be recompensated for his tax pre-payment from sales to the consumer at the cooler and lesser gallon-volume amount; the dealer pre-pays taxes at time of delivery on a per-gallon basis on more gallons than he is able to sell from his pumps because the temperature heated gasoline has cooled and shrank in his underground storage tanks.

The Dealer Agreement does not make reference to any requirement for temperature compensation in the sale of petroleum from Shell to plaintiff. Nor does the contract define the word "gallon". The word gallon is mentioned only once in the Dealer Agreement. In paragraph 7, at page 2 of the Dealer Agreement, under the subheading "Products-Quantities-Quality" it states:

> Shell shall sell and deliver to dealer such quantities of petroleum products [in] the following

specified quantities (in thousands of gallons).... (Emphasis added).

The scientific basis for temperature compensation is well known as is the inequity resulting from Shell Oil's failure to temperature compensate its sales of petroleum products to its dealers. Three states within the ambit of plaintiff's proposed class have enacted statutes mandating temperature compensation; however, the effective dates are relatively recent. Arizona Revised Statute 41-2082 was effective July 27, 1983, Louisiana Revised Statute 51:821 was effective August 30, 1983, and California Business Professional Code 13520, was effective January 1, 1981.

REASONS FOR GRANTING THE WRIT

This is a case of first impression. The Dealer Agreement alleged in the complaint is a standard form contract typical of the type entered into with most if not all the dealers in Florida. The contract does not make any reference as to how the delivery of Shell's petroleum products shall be made to its dealers, i.e., it does not mandate that that the sales shall be on a temperature compensated basis nor does it mandate that the sales shall be at an ambient temperature rate. Plaintiff contends that the word "gallon" as to petroleum products means a temperature compensated gallon as generally and commonly understood in the industry. Defendant Shell contends that the term "gallon" means an amount not adjusted for temperature compensation. Plaintiff's steadfast position is that the contractual provision for payment by the gallon in the Standard Dealer Agreement

is ambiguous and requires extrinsic evidence to determine just what is meant by the "gallon" called for in the contract. Evidence of industry custom and usage is required. The dealer also wants to receive the same amount of gasoline he pays for and is able to resell.

The inequity of this situation is self-evident. Plaintiff, and all dealers similarly situated, purchase petroleum from Shell in an amount that shrinks when it is pumped from above-ground storage tanks at various loading points into transport tankers and then delivered into the dealers' underground storage tanks. When plaintiff sells this petroleum to the public from his service station, it is a less actual volume amount of petroleum than when it was delivered and purchased. The issue raised by this lawsuit, therefore, effects not only the current parties, but the class of dealers in states whose average annual ambient temperature exceeds 60 degrees Fahrenheit, and

the millions of consumers who purchase Shell gasoline at the dealers' service stations as well. Other oil companies operating in warm climate states would look closely to a decision rendered by this Court after being fully briefed on the matter. Indeed, in light of the dominant role occupied by Shell Oil in its relationship with its dealers, reversal of the district court's dismissal of the action with prejudice may be the only chance plaintiff and the proposed class would have to present extrinsic evidence of a latent ambiguity to a court with proper jurisdiction. See, e.g., Burger King Corp. v. Macshara, 724 F.2d 1505, 1512 (11th Cir. 1984); see also Quayside Associates v. Harbour Club Villas Condominium Ass'n, Inc., 419 So. 2d 678, 679 (Fla. 3d. Dist. Ct. App. 1982) ("Where... the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented.")

The Eleventh Circuit's affirmance of the district court's dismissal of plaintiff's action leaves plaintiff in a highly inequitable position and one he did not bargain for when he entered into the Standard Dealer Agreement. He receives less petroleum than what he pays for. In selling his petroleum to the motoring public, he may feel, or in fact is compelled to feel, by the instinct to survive, that he must rectify the net loss by either charging an artificially high price for a "gallon" of gasoline, or even worse, artificially heating the petroleum so that it expands to the same volume that he originally purchased from Shell.

The same argument pertains to the process in which Shell collects state and federal taxes from plaintiff and other dealers. Plaintiff attempted to raise this issue in the district court by way of a Motion for Leave to File an Amended Complaint and an accompanying Amended Complaint, but the district court

mooted this motion by its order dismissing the action with prejudice.

(The dealers pre-pay taxes to Shell by the "gallon" on their monthly invoices. Of course this "tax gallon" is at a warmer, ambient temperature (and greater volume) than the same gasoline Shell purchased on the market. However, since Shell purchases its gasoline on a temperature-compensated basis, it may pay less gross tax than it collects from plaintiff.)

Plaintiff collects tax from the public on a cooler and smaller "gallon"; therefore, he cannot and does not recoup his pre-paid tax to Shell based on the warmer and larger "gallon" that was delivered to him.

The Court of Appeals held that dismissal of the complaint was appropriate since the contract does not provide for temperature compensation in the delivery and price of gas. As stated earlier, however, the contract only mentions the word "gallon" once and no

definition is given to that word. The meaning of the word "gallon" could only be determined by reference to custom and usage in the industry and the law of equity. At this juncture, this can be accomplished only by the granting of this petition for certiorari.

The dismissal of the complaint with prejudice based on Shell's first affirmative defense that the complaint fails to state a cause of action woefully fails to accord the procedural due process safeguards a litigant is entitled. It is, in effect, a sua sponte dismissal in violation of Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983). "The trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court...." Jefferson, 695 F.2d at 526 (quoting California Diversified Promotions,

Inc. v. Musick, 505 F.2d 278, 281 (9th Cir. 1981)). The district court in the case at bar took none of these precautions. Dismissal of the case was inappropriate. Therefore, under Czeramcha v. Intern. Ass'n of Mach. & Aero. Workers, 724 F.2d 1552 (11th Cir. 1984), plaintiff's right to ask the court for permission to amend the complaint did not terminate.

CONCLUSION

For all the foregoing reasons this Court should issue a writ of certiorari to the Eleventh Circuit Court of Appeals, directing that court to reverse the district court's dismissal of the complaint with prejudice, and direct that proceedings continue on the issues presented by the amended complaint as a class action.

RESPECTFULLY SUBMITTED, this 18 day of December, 1986.

A. P. WALTER, JR., P. A.
235 Catalonia Avenue
Coral Gables, Fla. 33134
(305) 442-1919

By: _____
A. P. WALTER, JR., ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of this Petition for Writ of Certiorari was mailed by first-class postage pre-paid, to William Lowerre, Esq., Shell Oil Company, One 4762 Shell Oil Plaza, Houston, Texas 77252-2463, and Sheryll Dunaj, Esq., Fowler, White, Burnett, Hurley, Banick, and Strickroot, P. A., City National Bank Building, Fifth Floor, 25 West Flagler Street, Miami, Florida 33130, this 18 day of December, 1986, and by this Certificate of Service, all parties required to be served have been served.

By: _____
A. P. WALTER, JR., ESQ.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5011
Non-Argument Calendar

JULIO T. GONZALEZ, and all
other similarly situated,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 31, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

In this diversity jurisdiction action, the plaintiff service station operator seeks damages against Shell Oil Company because it did not adjust the price of gasoline sold to plaintiff to reflect temperature variations. Since gasoline expands in warm weather, a gallon delivered in a place where the average air temperature is above 60% Fahrenheit has less fuel capacity than when delivered in colder weather, at which time the gasoline is contracted. The district court properly dismissed the complaint for failure to state a cause of action on the ground that the contract is unambiguous and does not provide for temperature compensation in the delivery and price of gas. We affirm.

The district court decided that the dealer agreement alleged in the complaint is a

standard form contract typical of the type entered into with most if not all the dealers in Florida. The contract makes no reference to any requirement for temperature compensation in the delivery of Shell's gasoline products.

> The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so.

The district court's decision is consistent with Florida franchise contract law, which holds that in construing a contract, the intention of the parties must be ascertained from the language used in the instrument. Trail Burger King, Inc. v. Burger King of Miami, Inc., 187 So.2d 55 (Fla.3d DCA 1966).

Plaintiff's brief notes that the scientific basis for temperature compensation is well known and that Shell has resisted dealers' requests to temperature compensate. Although some states mandate temperature compensation, Florida law appears to have

imposed no such requirement, and thus does not prohibit carrying out the parties' agreement. The district court correctly determined that Gonzalez could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 177 (5th Cir. 1968).

Contrary to plaintiff's argument, the dismissal here was not a sua sponte action by the court reversible under Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) (district court's sua sponte dismissal of the complaint without notice deprived third party plaintiff of its right to procedural due process). Here the defendant had asserted as a defense in its answer, the failure of the complaint to state a cause of action. The district court treated that defense as a motion to dismiss. Any due process or rule violation problems were cured when the district court fully considered a

Motion for Reconsideration and the arguments of plaintiff, fully briefed with the motion.

There is no merit to the argument that the district court in effect granted summary judgment without proper notice and opportunity for argument. The district court clearly treated this matter as a motion to dismiss a complaint and made its determination on the face of the complaint.

Finding that the complaint did not state a cause of action, the district court did not err in failing to certify the class. Neither did the district court err in denying plaintiff's motion to file an amended complaint and in denying any leave to further amend by dismissing the cause with prejudice. This Court has adopted the rule that after a complaint is dismissed, the right to amend under Rule 15(a) terminates. Czeremcha v. Intern. Ass'n. of Mach. & Aero. Workers, 724 F.2d 1552 1556 n.6 (11th Cir. 1984). Plaintiff has suggested no theory upon which

he could prevail in the face of a clear and unambiguous contract.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5011

JULIO T. GONZALEZ, and all
other similarly situated,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(September 19, 1986)

BEFORE: RONEY and HATCHETT, Circuit Judges,
and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

s/Paul H. Roney
United Stated Circuit Judge

REHG-d
(Rev.9/85)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-2711-CIV KING

JULIO GONZALEZ, et al.,

Plaintiff,

-vs-

SHELL OIL COMPANY,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

THIS CAUSE arises upon the Defendant's motion to dismiss filed as the Defendant's first defense in their answer.

Accordingly, after a careful review of the record, and the Court otherwise being fully advised in the premises the Court would find as follows:

The Plaintiff is a Shell Oil gasoline dealer who is franchised by the Defendant to sell Shell Oil gasoline products. The dealer agreement entered into between the parties is a standard form contract typical of the type

entered into with most if not all the dealers in Florida. The contract (attached as Plaintiff's exhibit #1 to the complaint) makes no reference to any requirement for temperature compensation in the delivery of Shell's gasoline products. The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so.

The Federal Rules of Civil Procedure only require that the Plaintiff make a short and plain statement of the claim showing that the pleader is entitled to relief. F.R.Civ.P. 8(a) Further when considering a motion to dismiss the court must view the facts as plead in the light most favorable to the Pleader and it is the general rule that a complaint should not be dismissed unless under no conceivable set of facts could the Plaintiff recover. BOBBY JONES GARDEN APARTMENTS v. SULSKI 391 F.2d 172 (5th cir. 1968), POSTON v. AMERICAN

PRESIDENT LINES 452 F.Supp. 568 (S.D. Fla. 1978).

The contract by it's own terms clearly makes no requirement that the gasoline delivered under the contract need be adjusted for temperature variations. The parties could have contracted for such a temperature compensation but they failed to do so.

The State of Florida has no requirement that gasoline need be temperature compensated as some states require. Thus the facts plead even when taken in the light most favorable to the Plaintiff would not support a recovery in this case.

Therefore be it ORDERED and ADJUDGED that the Plaintiff's motion to dismiss as incorporated in their answer be and hereby is GRANTED. This case stands dismissed with prejudice.

DONE and ORDERED in chambers at the United States Courthouse, Federal Courthouse

Square, Miami, Florida this 29th day of November 1985.

s/_____
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:counsel

NO. 86-1043

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

JULIO T. GONZALEZ,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1) Whether the Trial Court committed procedural error in granting Shell Oil Company's Motion to Dismiss.

2) Whether, under Florida law, the word "gallon", as used in the Shell Oil Company Dealer Agreement, is ambiguous.

II

PARTIES

Petitioner Julio T. Gonzalez, a Shell Oil Company dealer residing in Florida, is suing on behalf of himself as well as all other Shell Oil Company gasoline dealers whose point of delivery is located where the annual average ambient isotherm exceeds 60°F.

Respondent Shell Oil Company wholly owns all of the stock of Scallop Coal Corporation and Shell Energy Resources Inc., which company wholly owns all of the stock of Pecten International Company, Shell California Production Inc., Shell Offshore Inc., Shell Mining Company, and Shell Western E&P Inc. All of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60 percent by Royal Dutch Petroleum Company and 40 percent by Shell Transport and Trading Company, a Public Limited Company in London, U.K. Shell Oil Company also wholly owns directly or indirectly a number of companies. The following companies are affiliated with Shell Oil Company or one of the affiliates named above, but are not wholly owned subsidiaries:

Quazite Corporation
First Harlem Securities Corporation
Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston

Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Pioneer Equipment Co.
Seadock, Inc.
Pecten Cameroon Company
Thums Long Beach Company
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Cortez Capital Corporation
Plastibeton, Inc.
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Lone Star Polymer Concrete Corporation
General Hydrocarbon Polymer Concrete Inc.
Polycon Research, Inc.
Morrison Molded Fiber Glass Company
Premix/E.M.S. Inc.
Knytex, Inc.
CRI Ventures, Inc.
Glastrusions, Inc.
Glass-Steel, Inc.
Huntsman Chemical Company
Lucky Chance Mining Company, Inc.
George Neuman and Company
United Scientific, Inc.
A. T. Massey Coal Company, Inc.

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NO. 86-1043

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

JULIO T. GONZALEZ,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Shell Oil Company, Respondent herein and Appellee and Defendant in the courts below, submits this Brief in Opposition to Petition for Writ of Certiorari, in accordance with Rule 22 of this Court.[1]

1. Sup. Ct. R. 22.

COUNTERSTATEMENT OF THE CASE

By this lawsuit, Plaintiff/Petitioner Julio T. Gonzalez, an operator of a Shell gasoline service station in Miami, Florida, sought to have the District Court certify him to be the representative of a class, consisting of all Shell gasoline dealers whose point of delivery is located where the average temperature of the air exceeds 60° Farenheit (paragraph 13 of Complaint, R. 6),[2] to declare that the Dealer Agreement which Plaintiff signed with Shell (Exhibit "A" to the Complaint, R. 11-25) requires that the price charged by Shell for all gasoline delivered to any member of the class be adjusted to reflect temperature variations, and to award damages for all gasoline sales made which did not reflect such temperature variations. Approximately four months after the Complaint was filed, the District Court, after reviewing the 36 pages of exhibits which had been attached to the Complaint (R. 11-46), determined that "[t]he contract by its own terms clearly makes no requirement that the gasoline delivered under the contract need be adjusted for temperature variations" (R. 152; P. App. 10), and dismissed the case with prejudice on the basis that the Complaint failed to state a cause of action against Shell upon which relief can be granted. No determination was ever made with respect to the class certification request.

Subsequently, Petitioner moved to vacate the Order of Dismissal, requested oral argument on his Motion to Vacate, and moved for Summary Judgment. Each of these motions, along with Plaintiff's Motion for Leave to File Amended Complaint, was denied by the District

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2. References to the pages of the Record Excerpts will be made by use of "R." Petitioner's Appendix will be referred to as "P. App."

Court. (R. 153-154). Petitioner Gonzalez's appeal to the United States Court of Appeals for the Eleventh Circuit was denied on July 31, 1986 (P. App. 1) in an Opinion stamped "Do Not Publish".

ARGUMENT

Petitioner contends that this is a case of first impression. To the extent that no two cases have identical fact patterns, this is probably a case of first impression. There is, however, no novel issue of law presented in this diversity action. Neither is there any important question of federal law nor is there any previously unsettled issue involved in this Petition. As will be shown below, and as recognized by the Eleventh Circuit, no procedural error was committed by the District Court and there was no misapplication of Florida law to the case.

A. The Trial Court Committed No Procedural Error In Granting Shell's Motion To Dismiss

Petitioner bases his procedural complaints upon the naked conclusion that the Trial Court's order granting Defendant's Motion to Dismiss was a *sua sponte* order in violation of the Eleventh Circuit's own opinion in *Jefferson Fourteenth Assoc. v. Wometco de Pureto Rico,* 695 F.2d 524 (11th Cir. 1983). Simply stated, however, the Eleventh Circuit reviewed Chief Judge King's handling of this case and concluded that "the dismissal here was not a *sua sponte* action by the Court reversible under *Jefferson Fourteenth Assoc.* . . . ." (P. App. 4). The Circuit Court went on to point out that the District Court had granted Shell's Motion to Dismiss and, further, that any due process problems were cured when the

District Court considered Petitioner's Motion for Reconsideration (P. App. 4-5).

Although the Circuit Court had concluded that the District Court's opinion was not a *sua sponte* action, falling within its own *Jefferson Fourteenth Assoc.* opinion, Petitioner, at no point in his Petition for Writ of Certiorari, attempts to explain why the Circuit Court erred in concluding that the District Court's opinion was not a *sua sponte* action. See Petition at 6, 16-17.

Assuming, however, that the Eleventh Circuit was in error and that the order was a *sua sponte* action by the District Court, such procedure does not constitute reversible error.

Recently, the Fifth Circuit was faced, apparently for the first time, with a set of facts very similar to those at bar. *Shawnee Int'l., N.V. v. Hondo Drilling Co.*, 742 F.2d 234 (5th Cir. 1984). In response to the Complaint, Hondo moved for a Rule 12(b)(6) dismissal. Shawnee then moved to amend its Complaint. The District Court then dismissed the Complaint. In response to Shawnee's argument that the District Court had committed error in dismissing the case *sua sponte*, the Fifth Circuit held, *id.* at 236,

> Shawnee argues that the district court's dismissal was unlawful in that the court acted *sua sponte* before Hondo moved for such relief. We do not so construe the record, but even if it were so, we reject this argument and align ourselves with our colleagues in the other circuits who have held that a district court may dismiss a complaint on its own motion for failure to state a claim. *Pavilonis v. King*, 626 F.2d 1075 (1st Cir. 1980); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980); *Bryson v.*

> *Brand Insulations, Inc.*, 621 F.2d 556 (3d Cir. 1980); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059 (6th Cir. 1984); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194 (7th Cir. 1977); *Silverton v. Dept. of the Treasury*, 644 F.2d 1341 (9th Cir. 1981) . . .

In addition to the six United States Circuit Courts referred to above, as well as the Fifth Circuit, the Eighth Circuit has also joined the ranks of those Circuits approving of the procedure by which a District Court dismisses a case, *sua sponte*, for failure to state a claim. See *K/O Ranch, Inc. v. Norwest Bank*, 748 F.2d 1246, 1248 n.3 (8th Cir. 1984). Thus, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have specifically approved of the procedure which Petitioner complains was inappropriate.

The conclusion that a District Court has the right to dismiss a case *sua sponte* for failure to state a cause of action is obviously correct. As was noted by the United States Supreme Court, in a related area, "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" *Link v. Wabash R.R.*, 370 U.S. 626, 630-631, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962). See also *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983).

Additionally, there is no greater hardship worked on a plaintiff when the court dismisses a case *sua sponte* than when the plaintiff has the opportunity to respond to the defendant's motion to dismiss. As recognized by

the Fifth Circuit, a plaintiff still has the opportunity to move for reconsideration, as Petitioner did do in this case, as well as to appeal the dismissal, as Petitioner obviously did. See *Bierman v. Tampa Elec. Co.*, 604 F.2d 929, 930 (5th Cir. 1979).

The last question to be addressed with respect to whether the District Court committed procedural error in handling this matter is whether Chief Judge King applied the proper test in assessing that the case should be dismissed on the pleadings. Petitioner never argues with the standard followed by Chief Judge King in his order of dismissal and fails even to mention the cases cited by the District Court. The obvious reason for this omission is that the District Court applied the proper standard. As observed in the Order Granting Defendant's Motion to Dismiss (R. 151-152; P. App. 9-10),

> [W]hen considering a motion to dismiss the court must view the facts as plead in the light most favorable to the Pleader and it is the general rule that a complaint should not be dismissed unless under no conceivable set of facts could the Plaintiff recover. *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172 (5th Cir. 1968), *Poston v. American President Lines*, 452 F.Supp. 568 (S.D. Fla. 1978).

As shown above, there can be no question but that the District Court acted well within the bounds of acceptable judicial conduct in addressing the merits of this case, pursuant to Rule 12(b)(6). The Federal Rules of Civil and of Appellate Procedure provide adequate safeguards, should a plaintiff believe that the district judge has made a mistake.

B. Under Florida Law, The Word "Gallon", As Used In The Shell Oil Company Dealer Agreement, Is Not Ambiguous

As has been shown above, the District Court did not err in the procedural steps taken in dismissing the Complaint for failure to state a cause of action. The issue now becomes whether the District Court erred in its decision to dismiss the Complaint. As will be shown below, there was no error by the District Court.

The Circuit Court agreed with the District Court that the Dealer Agreement is a standard form contract typical of the type entered into by Shell with its dealers in Florida and that it makes no reference to the requirement of temperature adjustment in the sale of gasoline by Shell to its dealers. The Circuit Court then adopted the District Court's conclusion that "The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so." This conclusion, the Circuit Court decided, is consistent with Florida franchise contract law, citing the case of *Trail Burger King, Inc. v. Burger King of Miami, Inc.*, 187 So.2d 55 (Fla. 3d Dist. Ct. App. 1966) (P. App. 3).

It is of interest that Petitioner never addresses the *Trail Burger King* case in his Petition; nor does Petitioner argue with the conclusion that the parties could have contracted with respect to temperature compensation, but did not. Instead, Petitioner argues that "The inequity of this situation is self-evident," (Petition at 12) and that this case may be Petitioner's "only chance" to recover for these inequities. (Petition at 13) In support of this conclusion, Petitioner cites the case of *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1512 (11th

Cir. 1984). The problem with relying upon this case is that it was reversed by this honorable United States Supreme Court. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985).

The courts below have, in addition, pointed out that, although some states require temperature adjustment on the sales of gasoline by an oil company to its dealers, Florida law imposes no such requirement. (P. App. 3-4, 10) Thus, there is no prohibition against the intention of the parties, as expressed in the contract, not to have sales reflect temperature correction.

Whether a contract is ambiguous under Florida law is a question of law for the court; for, "[w]hen a contract is clear and unambiguous, . . . the court cannot give it any meaning beyond that expressed." *Bay Management, Inc. v. Beau Monde, Inc.,* 366 So.2d 788, 791 (Fla. 2d Dist. Ct. App. 1978). As pointed out by the Florida Supreme Court, "To hold otherwise would be to do violence to the most fundamental principle of contracts." *Hamilton Constr. Co. v. Board of Public Instruction,* 65 So.2d 729, 731 (Fla. 1953). See also, *City of Winter Haven v. Ridge Air, Inc.,* 458 So.2d 434, 435-436 (Fla. 2d Dist. Ct. App. 1984).

Try as he might to have the courts re-write the contract, Petitioner is met with the District Court's conclusion that the contract is unambiguous. As the Order points out, "The parties could have contracted for such a temperature compensation but they failed to do so." (R. 152; P. App. 10). This conclusion is consistent with the law of Florida, which recognizes that "where a contract is silent as to a particular matter, courts should not,

under the guise of construction, impose on parties contractual rights and duties which they themselves omitted." *BMW of North America, Inc. v. Krathen,* 471 So.2d 585, 587 (Fla. 4th Dist. Ct. App. 1985).

Having found no uncertainty in the terms as a matter of law, courts are prohibited from re-writing the contract so as to adopt appellant's asserted interpretation of the contract. See *Solis-Ramirez v. United States Dept. of Justice,* 758 F.2d 1426, 1429 (11th Cir. 1985).

Petitioner should not now be heard to argue that the contract means something other than the plain meaning found therein. Petitioner chose to attach a copy of his contract to the Complaint. (R. 11-25) Having done so, Rule 10(c), of the Federal Rules of Civil Procedure, makes the contract a part of the pleadings for all purposes, including a Rule 12(b)(6) dismissal. An observation by the Fifth Circuit in the early case of *Simmons v. Peavy-Welsh Lumber Co.,* 113 F.2d 812, 813 (5th Cir. 1940), is as appropriate here as it was then.

> This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much and has refuted his own allegations by setting forth the evidence relied on to sustain them. * * * Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.

See also, *Nishimatsu Construction Co., Ltd. v. Houston Nat'l. Bank,* 515 F.2d 1200, 1207 (5th Cir. 1975). As in *Simmons,* the litigant and pleader here was and is "defeated . . . by his own exhibits." Accord, *General Guaranty Ins. Co. v. Parkerson,* 369 F.2d 821, 825

(5th Cir. 1966), affirming dismissal of Plaintiff's Complaint and suit, and stating apropos of this suit, that

> [t]his complaint is plagued not by what it lacks, but by what it contains. All of the paths to relief which the pleader suggests are blocked by the allegations and the attached documents themselves, without more.

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is not such a case. The decision of the Eleventh Circuit Court of Appeals was fully consistent with established legal principles.

Respectfully submitted,

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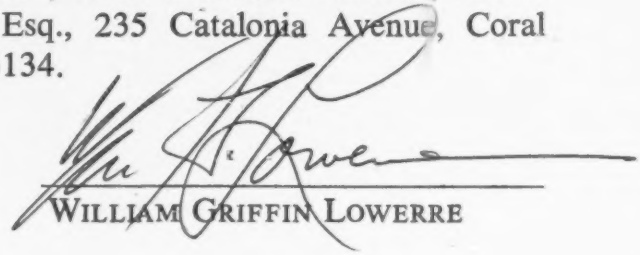
DATED: February 18, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by deposit with the United States Post Office, first class postage prepaid, on this the 18th day of February, 1987, to counsel for Petitioner, Albert Peter Walter, Jr., Esq., 235 Catalonia Avenue, Coral Gables, Florida, 33134.



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